No. OCTOBER TERM, 1909.

IN THE

Supreme Court of the United States

PHILADELPHIA AND READING RAILWAY COMPANY,
Petitioner,

vs.

MARIE E. POLK, Respondent.

BRIEF FOR PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI.

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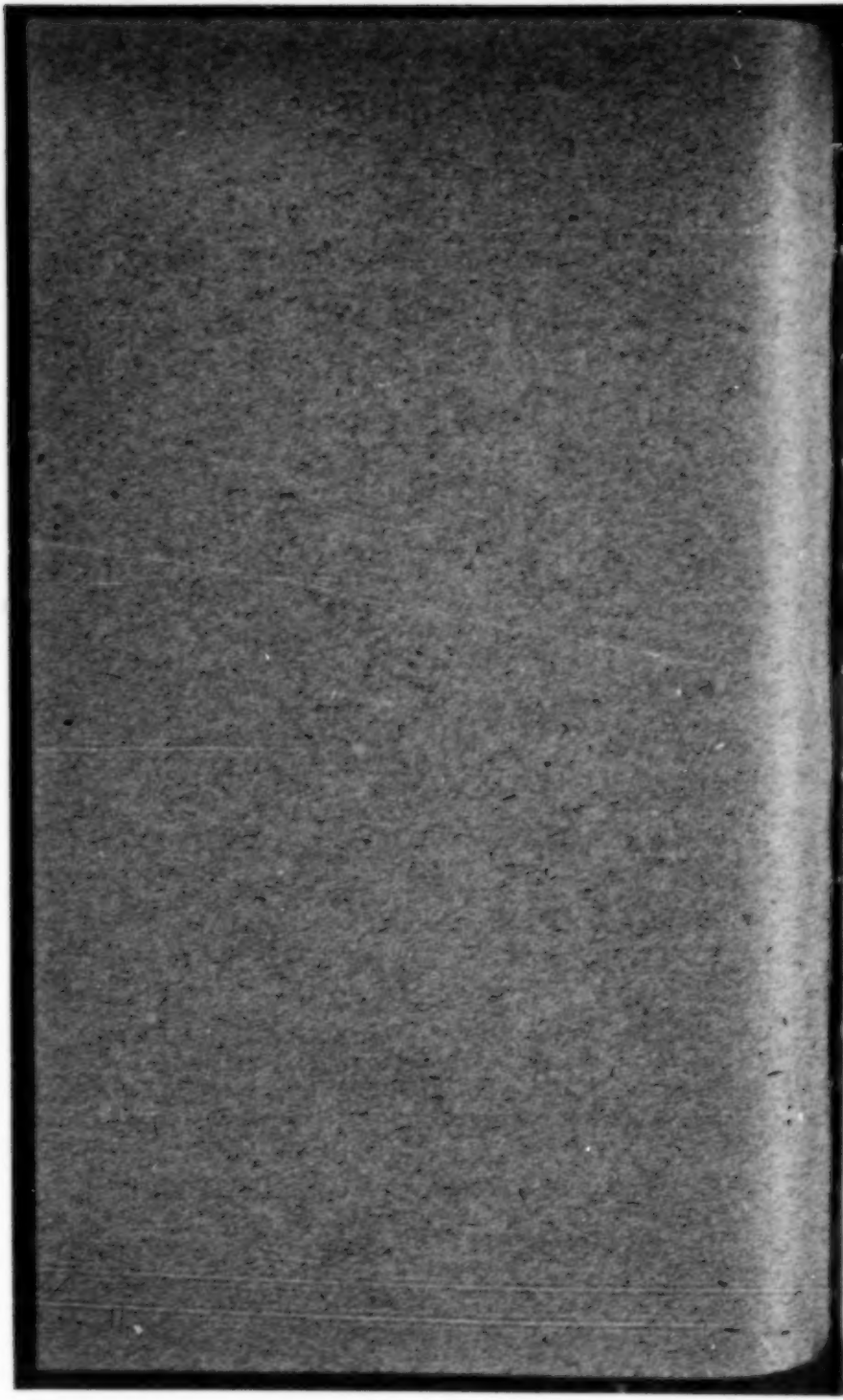


In the Supreme Court of the United States.

OCTOBER TERM, 1920. No. .

Philadelphia and Reading Railway Company, Petitioner,

vs.

Marie E. Polk, Respondent.

PETITIONER'S BRIEF ON APPLICATION FOR WRIT OF *CERTIORARI.*

The question involved in this case is of great importance not only to interstate carriers by railroad, and the employees of such carriers engaged in interstate commerce, but to those persons engaged in the trial of cases under the Federal Employers' Liability Act, and the Workmen's Compensation Act of Pennsylvania.

Is a brakeman engaged in interstate commerce while employed on a freight train containing cars bound from points without and within the State of Pennsylvania to points within and without the said State?

The answer to this question is not far to seek. It is settled beyond argument that a train containing cars bound from a point in one State to a point in another State, or

shipments so consigned, is an interstate train, and those employed in moving or facilitating the movement of such cars or shipments are engaged in interstate commerce. This is true when such employee's duties are exclusively performed within the boundaries of a State.

In N. P. Ry. *vs.* State of Washington, *222* U. S. 370, at 378, Chief Justice White said:—

> "The train though moving from one point to another in the State of Washington, was hauling merchandise from points outside the State destined to points within the State and from points within the State to points in British Columbia. This transportation was interstate commerce, and the train was an interstate train, despite the fact that it may also have been carrying some local freight. In view of the unity and indivisibility of the service of the train crew, and the paramount character of the authority of Congress to regulate commerce, the Act of Congress was exclusively controlling." Sou. Ry. *vs.* U. S., *222* U. S. *20*.

To the same effect are Railway Co. *vs.* Knapp, *233* Fed. Rep. 950, and Railroad Co. *vs.* Carr, *238* U. S. *260*; Waters *vs.* Guile, *234* Fed. Rep. 532. We proceed then to consider whether the character of the train in question brings the case within the scope of these authorities.

Of this there does not seem to be the slightest room for doubt. The Referee, whose findings were adopted and affirmed by the Compensation Board, said in his third additional finding of fact:—"At the time of the occurrence of the injury there was a draft of freight cars attached to the engine which was in charge of the crew of which John M. Polk was a member. Some of these cars were bound from points within the State of Pennsylvania to other points with the State of Pennsylvania, and the others were cars loaded with various commodities, some of which

were bound from points outside the State of Pennsylvania to points within the State of Pennsylvania and others of which were bound from points within the State of Pennsylvania to points outside of the State of Pennsylvania, and there was at least one car of this draft of freight cars which was passing through Pennsylvania from a point in New York to a point in Illinois."

Referee's award, pages 26, 27.

And in the fourth agreed finding of fact the Referee said:—

> "John M. Polk while employed as a brakeman, on a freight train in the Port Richmond Yard of the defendant in Philada., Penna., handled by engine #832, was caught between two cars, and as a result thereof sustained certain injuries." Referee's award, page 26.

The findings when read together can only mean that Polk was a brakeman on the crew of engine 832; that while he was working on an interstate train handled by and attached to engine 832 he was caught between two of the cars in that train and injured.

It would seem then that the claimant's decedent was injured while engaged in interstate commerce within the meaning of the Federal Employers' Liability Act and that any right of action growing out of his death resulting from the said injury must be based upon the said Act and not upon the Workmen's Compensation Act of Pennsylvania.

The Compensation Referee made an award of compensation to the claimant for reasons which appear to us to be altogether frivolous. It is clear that no doubt was entertained that Polk was at work on an interstate train, but the Referee sought to evade the legal conclusion that this constituted an employment in interstate commerce, by asserting that the defendant below had failed to meet the burden of proof because it did not by testimony specifically

exclude every conceivable task, unrelated to interstate commerce, either on or off the train, that a brakeman might perform if ordered to. We did not think it lay in human ingenuity or perversity to imagine or impose such a test. And if there ever was such a rule of law what reason had the defendant to call witnesses to exclude a mere possibility which had already been excluded by an established fact to the contrary.

It appears from the award that the claimant came to the hearing without witnesses in her behalf. It was clear that she could not make out a *prima facie* case unless she proved that her husband was at work when injured, so the defense had only called a witness to prove the character of the train in question, if it was put to proof at all. The claimant herself could prove nothing but dependency and funeral expenses and unless the defense agreed to admit other facts essential to her proof the case could not go on. At the request of the Referee, the defense agreed that Polk was working in the course of his employment as a brakeman on the train hauled by engine 832 and that while so employed he was crushed between two of the cars. This agreement the Referee undertook to incorporate and did incorporate in his findings of fact (award, pages 26, 27, 28).

In view then of the agreement and findings it is difficult to treat seriously the learned Referee's critical and elaborate discussion to reach the conclusion that there is no proof of what Polk was doing when he was hurt. True there is nothing to show whether he was applying a brake, coupling an air hose, signalling the engineman or the like, but this we submit is utterly immaterial, for if the finding had been, for instance, that Polk was making a coupling, it could have had no greater effect than to support the inference that he was employed in doing a brakeman's work. Now it is established as an undisputed fact that he was employed in the performance of his duties, in the course of his employment as a brakeman on this interstate train and the ruling of the Referee is reduced to this: Although it

is agreed that a man was employed in the performance of his duties as a brakeman on a certain train, it is, nevertheless essential to prove the performance of a particular task to support the inference agreed upon.

To state this proposition is to condemn it.

The Supreme Court of Pennsylvania affirmed the award upon the ground that "The Referee found *as a fact* that the appellant (your petitioner) had failed to meet the burden of proof which rested upon it. His distinct finding was "the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured." This, it is submitted was error, for it altogether ignores the specific findings of the Referee that Polk was doing a brakeman's work on an interstate train. If the Referee's findings were conclusive upon the learned Court below, it is clear that one finding could not be more conclusive than another, yet the essential finding of fact is ignored by the Court to fasten upon one that is altogether immaterial.

It must also be clear that the proof for the defendant which the Supreme Court of Pennsylvania finds to be insufficient rests on exactly the same basis as the proof for the claimant. By the word "testimony" we presume we are to understand the statement of a witness under oath, and while it is true that no witness was called by the defendant to show the nature of Polk's work, it is equally true that no witness was called by the claimant to show that he was at work at all. We do not think the question of the burden of proof is here involved at all; for when the parties to the action agreed that claimant's decedent was working on a particular train it was surely unnecessary to call witnesses to prove it. To argue this question is to quibble over words; a fact agreed upon in no way differs from a proven fact; it is established beyond cavil.

In the face then, of the specific finding that Polk was at work, in the course of his employment, as a brakeman on an interstate train; the finding that the defendant called no witness to show what work he was doing is, we submit, immaterial.

It seems scarcely necessary to point out that there was no burden upon the defendant to do anything until the

claimant proved facts to support a conclusion that her decedent was within the Compensation Act. If the claimant be deemed to have sustained the burden of proof by the finding that the decedent was employed as a brakeman on a particular train when he was injured, then, if there was any burden on the defendant to show the character of the employment, it must be deemed to have sustained it by the finding that Polk was employed as a brakeman on an interstate train.

In his award affirmed by the Supreme Court of Pennsylvania, the Referee said:—

> "We feel that it might well be that while this train was standing on the tracks in the yard awaiting further orders to proceed or even for some other reason that the conductor of the crew or some other superior of Polk's might have delegated him to perform some duties for the defendant which were not incident to or necessary for the continuance of the interstate journey of the cars in this draft. The engine and crew were a yard engine and crew. The testimony shows that this crew had no duties to perform outside of the yard limits. We feel that, particularly with a crew of this sort, there may have been many things which this brakeman might have been delegated to perform while he was still a member of this crew and had in charge the cars shown by the defendant to have been in this draft, entirely separate and apart from the movement of these cars, and of course in that case he would not have been at the time of the occurrence of the injury actually engaged in performing the duties incident to interstate commerce."
>
> Referee's award page 27.

This is no more than idle speculation. In the first place there is no finding of fact that the train was standing on the tracks in the yard waiting orders to proceed and no finding that Polk was delegated by anybody to perform any duties

incident to ~~inter~~INTRA state commerce, or, as the Referee puts it, "entirely separate and apart from the movement of these cars." Yet the award is based flatly on the ground that the defendant failed to exclude by proof some such possibility. It would seem, therefore, that the judgment has no foundation of fact on which to rest.

In Louisville and Nashville R. R. *vs.* Finn, 235 U. S. 601, the Court said:—

> "It has repeatedly been held by this Court that an administrative order made indisputably contrary to the evidence or without any evidence, must be deemed arbitrary and therefore subject to be set aside."

This Court has also repeatedly held that a Federal right is denied by the result of a finding without evidence to support it. N. P. R. R. *vs.* North Dakota, 236 U. S. 585; K. C. So. Ry. *vs.* Albers, 223 U. S. 573; Mackay *vs.* Dillon, 4 Howard 421; Dower *vs.* Richards, 151 U. S. 658; Stanley *vs.* Schwalby, 162 U. S. 255. Here after an express finding that Polk, when injured, was working as a brakeman on the train, the conclusion is reached that there is no proof that he was not doing some other work, and in consequence he was employed in some task incident to intrastate commerce. The denial of due process of law would seem to be involved by a judgment against the appellant without finding of fact to support it.

It is respectfully submitted that the writ of *certiorari* be granted as prayed for.

GEORGE GOWEN PARRY,
Counsel for Petitioner.

APPENDIX.

In the Supreme Court of Pennsylvania.

January Term, 1920.

Marie E. Polk, Plaintiff,

135. vs.

ge Gowen *Philadelphia and Reading Railway Company, Defendant.*

Appeal of Defendant.

No. 1919 September Term 1918 from the judgment.

Appeal from Court of Common Pleas No. 5 of the County of Philadelphia.
Filed August 27, 1919.
Eo die. Certiorari exit.
Retble. first Monday January 1920.
September 5, 1919. Record returned and filed.
January 5, 1920. Assignments of Error filed.
January 13, 1920. Argued.
February 2, 1920. Appeal dismissed and award affirmed. *Per Curiam.*
February 11, 1920. Petition for re-argument filed.
February 16, 1920. Reargument refused, *Per Curiam.*
February 20, 1920. Petition for Writ of Error filed.
February 23, 1920. Writ of error denied: *Per Curiam.*
March 4, 1920. Petition to stay the mandate pending application to the Supreme Court of the United States for writ of *certiorari* filed.
March 8, 1920. Petition denied: *Per Curiam.*
March 9, 1920. Petition to stay mandate pending application to Supreme Court of United States for writ of *certiorari*, filed.
And now, to wit, this 9th day of March, A. D. 1920, upon consideration of the foregoing petition and upon motion of Geo. Gowen Parry, Esq., Counsel for Phila. & Reading Rwy. Co., Appellant, it is ordered that the mandate in the above entitled case shall not issue but shall be stayed until April 5, 1920: and that if on or before that day there shall be filed with the Prothonotary of this Court an affidavit of Counsel for Phila. & Reading Rwy. Co., showing that a petition for a writ of *certiorari* has been filed by the said appellant in the Supreme Court of the United States that the mandate shall be held for a further period thereafter, and shall not issue before final disposition shall be made by the Supreme Court of the United States of the petition for the writ of *certiorari* aforesaid.

J. HARY BROWN, *J.*

IN THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

January Term, 1920. No. 135.

Mary E. Polk,

vs.

Philadelphia and Reading Railway Company, Appellant.

Appeal from Common Pleas, No. 5, Philadelphia.

Filed February 2, 1920.

Per Curiam:

The defense set up by the appellant to the claim made by the appellee for compensation for the death of her husband is that at the time he received his injuries he was a brakeman in its employ in connection with its interstate commerce business. The referee found that he was an employee of the appellant on a freight train, in the Port Richmond yard, in Philadelphia, at the time of his injuries, which resulted in his death on August 29, 1917. There was no presumption as to the character of his employment. If it was in connection with interstate commerce, as is alleged by appellant, the burden was upon the latter to show that fact: Hench *vs.* Pennsylvania Railroad Company, 246 Pa. 1; Murray *vs.* Pittsburgh, C., C. & St. L. Railroad Company, 263 Pa. 398. The referee found as a fact that the appellant had failed to meet the burden of proof which rested upon it. His distinct finding was "the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured."

Appeal dismissed and award affirmed.

AWARD OF THE REFEREE.

PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY.

Workmen's Compensation Bureau Harrisburg, Pa.

REFEREE'S AWARD OR DISALLOWANCE OF COMPENSATION.
Claim Petition No. 5722.

Marie E. Polk Claimant *vs.* Philada. & Reading Ry. Co. Defendant.

Hearing held at #1115 North American Building, Philada., Penna., on Tuesday, June 11th, 1918, at 10 A. M., at which there were present:—

Mrs. Marie E. Polk, 3545 Janney Street, Philada., Penna., Claimant; Michael Hayes, Esq., Penn Square Bldg., Philada., Penna., Counsel for Claimant; and

George Gowen Parry, Esq., 133 South 12th Street, Philada., Penna., Counsel for Defendant; and George S. Whertley, 3240 West Huntingdon Street, Philada., Penna., Witness for Defendant.

FINDINGS OF FACT.

At the hearing the Claimant and Defendant agreed on the following facts:—

First.—On August 28th, 1917, neither John M. Polk nor the Defendant had filed with the Workmen's Compensation Bureau, nor served upon the other, notice of rejection of Article III of the Workmen's Compensation Act of 1915, in accordance with the provisions of said Act.

Second.—On that date and for some time previous thereto, John M. Polk was in the employ of the Defendant, whose business was that of steam railway operator and whose place of business was at Philadelphia, Penna., as a brakeman;

Third.—In said employment on that date his wages were payable on an hourly basis and during so much of the six months previous thereto as he worked for the Defendant

his average weekly wage, exclusive of overtime, was Nineteen Dollars and Eighty Cents ($19.80) and was payable semi-monthly;

Fourth.—On that date John M. Polk while employed as a brakeman, on a freight train in the Port Richmond yard of the Defendant in Philada., Penna., handled by engine #832, was caught between two cars, and as a result thereof sustained certain injuries;

Fifth.—The Defendant had immediate knowledge of the occurrence of said injuries.

Sixth.—The Defendant furnished to John M. Polk proper and reasonable medical, surgical and hospital services, medicines and supplies, having him sent to the Episcopal Hospital, Philada.

Seventh.—John M. Polk died August 29th, 1917, as a result of the injury so sustained, and the Defendant had due knowledge of the death of John M. Polk, and that it resulted from the injuries aforesaid.

Eighth.—At the time of the occurrence of the injury the Defendant was a common carrier, by rail, engaged in both interstate and intrastate commerce.

The Referee finds the following additional facts:

First.—The expense of the last sickness and burial of John M. Polk exceeded One Hundred Dollars ($100.00) none of which has been paid by the Defendant;

Second.—John M. Polk left to survive him the following dependents:

His widow—Marie E. Polk—who resided with him at the date of his death, and the following children—
John Polk, born December 8th, 1907,
Charles Polk, born April 12th, 1910,
George Polk, born April 12th, 1910,
Arthur Polk, born November 29th, 1915;

Third.—At the time of the occurrence of the injury there was a draft of freight cars attached to the engine which was in charge of the crew of which John M. Polk was a

member. Some of these cars were cars bound from points within the State of Pennsylvania to other points within the State of Pennsylvania, and the others were cars loaded with various commodities, some of which were bound from points outside the State of Pennsylvania to points within the State of Pennsylvania, and others, of which were bound from points within the State of Pennsylvania to points outside of the State of Pennsylvania, and there was at least one car of this draft of freight cars which was passing through Pennsylvania, from a point in New York to a point in Illinois.

It was contended by the Defendant that under these facts John M. Polk was at the time of the occurrence of the injury, engaged in performing duties incident to interstate commerce, and that, therefore, the Claimant was not entitled to compensation. It has been repeatedly held by the Workmen's Compensation Board, and by the Courts, that the burden of establishing the fact that an employe was at the time of the occurrence of the injury engaged in performing the duties incident to interstate commerce, is upon the Defendant, who alleges this fact. In the present case we are of opinion that the Defendant has failed to meet this burden of proof. The Defendant contended that having shown that the work of the decedent as a member of this crew was work incident to interstate commerce, they have established the fact that the decedent was at the time of the occurrence of the injury actually engaged in performing such duties, and that therefore the Defendant had met the burden required of it. The Defendant offered no testimony whatever to show what work John M. Polk was performing at the time that he was injured; the Defendant simply showed that the draft of cars constituting the train, under the control of the crew of which John M. Polk was a member, contained cars en route in the course of interstate journeys, but we feel that it might well be that while this train was standing on the tracks in the yard awaiting further orders to proceed, or even for some other reason that the conductor of the crew or some other superior of Polk's might have delegated him to perform some

duties for the Defendant which were not incident to nor necessary for the continuance of the interstate journey of the cars in this draft. The engine and crew were a yard engine and crew. The testimony shows that this crew had no duties to perform outside of the yard limits. We feel that, particularly with a crew of this sort, there may have been many things which this brakeman might have been delegated to perform while he was still a member of this crew and had in charge the cars shown by the Defendant to have been in this draft, entirely separate and apart from the movement of these cars, and of course in that case he would not have been at the time of the occurrence of the injury actually engaged in performing the duties incident to interstate commerce.

The Defendant further contended that since at the time of the occurrence of the injury the employe was a member of a crew having in charge interstate cars, necessarily he must have been performing some duty incident to those cars or else he would have been acting outside the course of his employment. In this we cannot agree. We feel that it is the duty of the Defendant to show just what the employe was doing at the time of the occurrence of the injury and thus establish by the weight of the evidence the fact that at the time of the occurrence of the injury the employe was actually engaged in work incident to interstate commerce; otherwise, the Referee could but guess as to what the employe was doing, and this, of course, he is not permitted to do. We are, therefore, of opinion that the Defendant had not met the burden of proving that at the time of the occurrence of the injury John M. Polk was actually engaged in duties incident to interstate commerce.

Conclusions of Law.

On August 28th, 1917, both John M. Polk and the Defendant were bound by the terms of Article III of the Workmen's Compensation Act of 1915.

The injury sustained by John M. Polk on that date while acting in the course of his employment with the Defendant was such an injury by accident as is contemplated by

Article III, Section 301, of said Act; and since the Defendant had immediate knowledge of the occurrence of injury; and since the death of John M. Polk resulted from said injuries, and the Defendant had due notice of his death and that it had so resulted; and since John M. Polk left to survive him a dependent widow and children: and since the Defendant had failed to meet the burden of proving that at the time of the occurrence of the accident John M. Polk was actually engaged in performing duties incident to interstate commerce,—the Claimants are entitled to compensation.

AWARD.

Under Article III, Section 307, compensation is awarded as follows:—

To Marie E. Polk, One Hundred Dollars ($100.00) on account of the expenses of the last sickness and burial of John M. Polk and

Sixty Percent (60%) of the decedent's weekly wage of Nineteen Dollars and Eighty Cents ($19.80) or Eleven Dollars and Eighty-eight Cents ($11.88) per week, from August 29th, 1917, to May 29th, 1923; inclusive;

To the Guardian of John Polk, Charles Polk, George Polk and Arthur Polk, Forty-five Percent (45%) of decedent's weekly wage of Nineteen Dollars and Eighty Cents or Eight Dollars and Ninety-one Cents ($8.91) per week, from May 30th, 1923, to December 7th, 1923, inclusive;

To the Guardian of Charles Polk, George Polk and Arthur Polk, Thirty-five Percent (35%) of decedent's weekly wage of Nineteen Dollars and Eighty Cents ($19.80) or Six Dollars and Ninety-three Cents ($6.93) per week, from December 8th, 1923, to April 11th, 1926, inclusive;

To the Guardian of Arthur Polk, Fifteen Percent (15%) of decedent's weekly wage of Nineteen Dollars and Eighty Cents ($19.80) or Two Dollars and Ninety-seven Cents ($2.97) per week, from April 12th, 1926, to November 28th, 1931, inclusive.

(Signed) GEO. C. KLAUDER,
Referee, First District.

PHILADA., PENNA., July 15, 1918.

DECISION OF THE WORKMEN'S COMPENSATION BOARD.

MACKEY, Chairman.

The findings of fact and conclusions of law of the Referee are adopted by the Board and the award is affirmed.

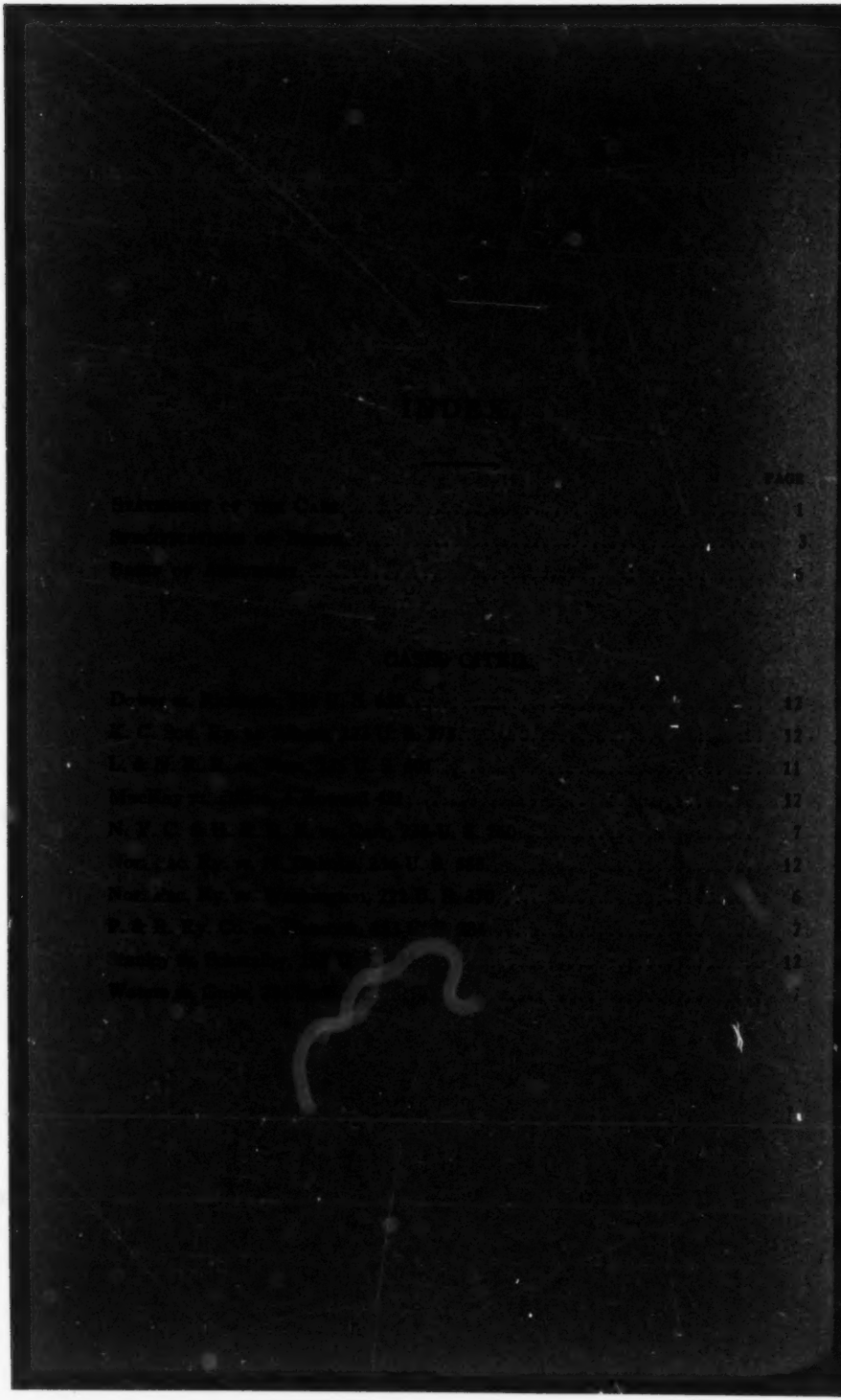
HARRY A. MACKEY,
Chairman.

Concurred in by Commissioners Scott and Leech.
OCTOBER 3, 1918.

DECISION OF THE COURT OF COMMON PLEAS.

No opinion was filed by the Court, which entered the following decree:—

> "Aug. 14, 1919. The appeal of the defendant is dismissed and judgment is directed to be entered in accordance with the award of the Referee and the Workmen's Compensation Board."



In the Supreme Court of the United States.

OCTOBER TERM 1920. No. 298.

Philadelphia and Reading Railway Company, Petitioner,

vs.

Marie E. Polk, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

STATEMENT OF THE CASE.

The case comes before the Court on a writ of *Certiorari* issued to the Supreme Court for the Commonwealth of Pennsylvania to review a judgment of that Court, affirming a judgment of the Court of Common Pleas No. 5, of Philadelphia County, Pennsylvania, which affirmed an award of the Workmen's Compensation Board of Pennsylvania. The question involved may be stated as follows:

Is a brakeman engaged in interstate commerce while employed on a freight train containing cars bound from points without and within the State of Pennsylvania to points within and without the said State?

The record shows that Marie E. Polk filed a petition under the Pennsylvania Workmen's Compensation Act to recover compensation for the death of her husband, a brakeman in the freight service of the defendant railway company, who was crushed between two cars in a freight train which was being handled by the defendant's engine, No. 832. Polk was a member of the crew of this engine and was at work in the course of his employment on this train when he was hurt. The train contained a number of cars, some of which were moving and en route from points outside the State of Pennsylvania to points within and without the State, and others which had originated in the State and were bound to points outside of it. The engine and crew were concerned merely with moving the train through the defendant's Port Richmond Yard in Philadelphia, Pennsylvania, and their usual duties did not take them beyond the yard limits. (Referee's findings, Record pages 11, 12.)

The Compensation Referee, although incorporating in his findings of fact the agreement of the parties that "Polk was employed as a brakeman on a freight train in the Port Richmond Yard of the defendant in Philadelphia, Penna., handled by engine No. 832, was caught between two cars and as the result thereof sustained certain injuries," and finding further that this train contained a number of interstate cars, made an award of compensation to the claimant on the ground that "the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured" and therefore the defendant had not met the burden of proof that "Polk was actually engaged in duties incident to interstate commerce." (Referee's findings, Record pages 12, 13.)

The Workmen's Compensation Board of the State of Pennsylvania adopted the Referee's findings of fact and conclusions of law and affirmed the award. The Court of Common Pleas, upon appeal, directed judgment to be entered in accordance with the award of the Referee and the Workmen's Compensation Board and dismissed

the appeal. This judgment was affirmed by the Supreme Court of Pennsylvania on the ground that "the Referee found as a fact the appellant had failed to meet the burden of proof which rested upon it. His distinct finding was 'the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured:'" (Opinion, Record page 28.)

A petition for a writ of *certiorari* was filed in this Court and allowed.

SPECIFICATIONS OF ERROR.

I. The Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Common Pleas No. 5 of Philadelphia County, State of Pennsylvania, for the respondent, whereby the petitioner was denied the right, privilege and immunity claimed by it under the Act of Congress of April 22,.1908, Chapter 149, 35 Stat. 65, commonly called the Federal Employers Liability Act. The decision of the Supreme Court of Pennsylvania is as follows:—

Per Curiam:

> The defense set up by the appellant to the claim made by the appellee for compensation for the death of her husband is that at the time he received his injuries he was a brakeman in its employ in connection with its interstate commerce business. The referee found that he was an employee of the appellant on a freight train, in the Port Richmond yard, in Philadelphia, at the time of his injuries, which resulted in his death on August 29, 1917. There was no presumption as to the character of his employment. If it was in connection with interstate commerce, as is alleged by appellant, the burden was upon the latter to show that fact: Hench *vs.* Pennsylvania Railroad Company, 246 Pa. 1; Murray *vs.* Pittsburgh, C., C. & St. L. Rail-

road Company, 263 Pa. 398. The referee found as a fact that the appellant had failed to meet the burden of proof which rested upon it. His distinct finding was "the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured."

Appeal dismissed and award affirmed.

II. The Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Common Pleas No. 5 of Philadelphia County, State of Pennsylvania for the respondent on the ground that "the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured" for it utterly ignores the facts established by the referee's fourth agreed finding, that he was actually employed as a brakeman on the train of engine No. 832 when he was injured by being caught between two cars, and by the third additional finding that the train was an interstate train and was under the control of the crew of which John M. Polk was a member, who had in charge the cars shown by the defendant to have been in the train. The said findings of the Referee are as follows:—

"*Fourth.*—On that date John M. Polk *while employed as a brakeman on a freight train* in the Port Richmond Yard of the defendant in Phila., Penna., *handled by engine #832, was caught between two cars*, and as a result thereof sustained certain injuries.

"*Third.—At the time of the occurrence of the injury there was a draft of freight cars attached to the engine which was in charge of the crew of which John M. Polk was a member.* Some of these cars were cars bound from points within the State of Pennsylvania to other points within the State of Pennsylvania, and the others were cars loaded with various commodities, some of which were bound from points outside the State of Pennsylvania to points within the State of Pennsylvania, and others of which were bound from

points within the State of Pennsylvania to points outside of the State of Pennsylvania, and there was at least one car of this draft of freight cars which was passing through Pennsylvania, from a point in New York to a point in Illinois.

"The defendant offered no testimony to show what work John M. Polk was performing at the time that he was injured; the defendant simply showed that *the draft of cars constituting the train, over the control of the crew of which John M. Polk was a member, contained cars enroute in the course of interstate journeys,* but we feel that it might well be that while this train was standing on the tracks in the yard awaiting further orders to proceed, or even for some other reason that the conductor of the crew or some other superior of Polk's might have delegated him to perform some duties for the defendant which were not incident to nor necessary for the continuance of the interstate journey of the cars in this draft. The engine and crew were a yard engine and crew. The testimony shows that this crew had no duties to perform outside of the yard limits. We feel that, particularly with a crew of this sort, there may have been many things which this brakeman might have been delegated to perform while *he was still a member of this crew and had in charge the cars shown by the defendant to have been in this draft,* entirely separate and apart from the movement of these cars, and of course in that case he would not have been at the time of the occurrence of the injury actually engaged in performing the duties incident to interstate commerce."

III. The Supreme Court of Pennsylvania erred in affirming the judgment of the Court below in favor of the respondent because by that decision it affirmed the award of the Workmen's Compensation Board, based upon a finding that the decedent was engaged in intrastate commerce which finding was contrary to the evidence.

- IV. The Supreme Court of Pennsylvania erred in holding that since there was no presumption as to the character of the employment the burden was upon the petitioner to show that it was in connection with interstate commerce, because there was no proof by the respondent tending to show an engaging in intrastate commerce. (The decision of the Supreme Court of Pennsylvania is set out in full as part of the first specification.)

BRIEF OF ARGUMENT.

The question involved in this case is of great importance not only to interstate carriers by railroad, and the employees of such carriers engaged in interstate commerce, but to those persons engaged in the trial of cases under the Federal Employers' Liability Act, and the Workmen's Compensation Act of Pennsylvania.

Is a brakeman engaged in interstate commerce while employed on a freight train containing cars bound from points without and within the State of Pennsylvania to points within and without the said State?

The answer to this question is not far to seek. It is settled beyond argument that a train containing cars bound from a point in one State to a point in another State, or shipments so consigned, is an interstate train, and those employed in moving or facilitating the movement of such cars or shipments are engaged in interstate commerce. This is true when such employee's duties are exclusively performed within the boundaries of a State.

In **N. P. Ry. vs. State of Washington,** 222 U. S. 370, at 375, Chief Justice White said:—

> "The train though moving from one point to another in the State of Washington, was hauling merchandise from points outside the State destined to points within the State and from points within

the State to points in British Columbia. This transportation was interstate commerce, and the train was an interstate train, despite the fact that it may also have been carrying some local freight. In view of the unity and indivisibility of the service of the train crew, and the paramount character of the authority of Congress to regulate commerce, the Act of Congress was exclusively controlling." Sou. Ry. vs. U. S., 222 U. S. 20.

To the same effect are **New York Central and Hudson River R. R. Co. vs. Carr,** 238 U. S. 260; **Philadelphia and Reading Railway Company vs. Hancock,** 253 U. S. 284; **Waters vs. Guile,** 234 Fed. Rep. 532. We proceed then to consider whether the character of the train in question brings the case within the scope of these authorities.

Of this there does not seem to be the slightest room for doubt. The Referee, whose findings were adopted and affirmed by the Compensation Board, said in his third additional finding of fact:—"At the time of the occurrence of the injury there was a draft of freight cars attached to the engine which was in charge of the crew of which John M. Polk was a member. Some of these cars were bound from points within the State of Pennsylvania to other points within the State of Pennsylvania, and the others were cars loaded with various commodities, some of which were bound from points outside the State of Pennsylvania to points within the State of Pennsylvania and others of which were bound from points within the State of Pennsylvania to points outside of the State of Pennsylvania, and there was at least one car of this draft of freight cars which was passing through Pennsylvania from a point in New York to a point in Illinois."

(Referee's findings, Record, page 12).

And in the fourth agreed finding of fact the Referee said:—

"John M. Polk while employed as a brakeman, on a freight train in the Port Richmond Yard of the defendant in Philada., Penna., handled by engine # 832, was caught between two cars, and as a result thereof sustained certain injuries." (Referee's findings, Record, page 11).

The findings when read together can only mean that Polk was a brakeman on the crew of engine 832; that while he was working on an interstate train handled by and attached to engine 832 he was caught between two of the cars in that train and injured.

It would seem that the claimant's decedent was injured while engaged in interstate commerce within the meaning of the Federal Employers' Liability Act and that any right of action growing out of his death resulting from the said injury must be based upon the said Act and not upon the Workmen's Compensation Act of Pennsylvania.

The Compensation Referee made an award of compensation to the claimant for reasons which appear to us to be altogether frivolous. It is clear that no doubt was entertained that Polk was at work on an interstate train, but the Referee sought to evade the legal conclusion that this constituted an employment in interstate commerce, by asserting that the defendant below had failed to meet the burden of proof because it did not by testimony specifically exclude every conceivable task, unrelated to interstate commerce, either on or off the train, that a brakeman might perform if ordered to. We did not think it lay in human ingenuity or perversity to imagine or impose such a test. And if there ever was such a rule of law what reason had the defendant to call witnesses to exclude a mere possibility which had already been excluded by an established fact to the contrary.

It appears from the award that the claimant came to the hearing without witnesses in her behalf. It was clear that she could not make out a *prima facie* case unless she proved that her husband was at work when injured, so

the defense had only called witnesses to prove the character of the train in question, if it was put to proof at all. The claimant herself could prove nothing but dependency and funeral expenses and unless the defense agreed to admit other facts essential to her proof the case could not go on. At the request of the Referee, the defense agreed that Polk was working in the course of his employment as a brakeman on the train hauled by engine 832 and that while so employed he was crushed between two of the cars. This agreement the Referee undertook to incorporate and did incorporate in his findings of fact. (Referee's findings, Record, page 11).

In view then of the agreement and findings it is difficult to treat seriously the learned Referee's critical and elaborate discussion to reach the conclusion that there is no proof of what Polk was doing when he was hurt. True there is nothing in the findings to show whether he was applying a brake, coupling an air hose, signalling the engineman or the like, but this we submit is utterly immaterial, for if the finding had been, as averred in the petition, that Polk was making a coupling, it could have had no greater effect than to support the inference that he was employed in doing a brakeman's work. Now it is established as an undisputed fact that he was employed in the performance of his duties, in the course of his employment as a brakeman on this interstate train and the ruling of the Referee is reduced to this: *Although it is agreed that a man was employed in the performance of his duties as a brakeman on a certain train, it is, nevertheless essential to prove the performance of a particular task to support the inference agreed upon.*

To state this proposition is to condemn it.

The Supreme Court of Pennsylvania affirmed the award upon the ground that "The Referee found *as a fact* that the appellant (your petitioner) had failed to meet the burden of proof which rested upon it. His distinct finding was "the defendant offered no testimony whatever to show what work John M. Polk was performing at the time he was injured." This, it is submitted was error,

for it altogether ignores the specific findings of the Referee that Polk was doing a brakeman's work on an interstate train. If the Referee's findings were conclusive upon the learned Court below, it is clear that one finding could not be more conclusive than another, yet the essential finding of fact is ignored by the Court to fasten upon one that is altogether immaterial.

It must also be clear that the proof for the defendant which the Supreme Court of Pennsylvania finds to be insufficient rests on exactly the same basis as the proof for the claimant. By the word "testimony" we presume we are to understand the statement of a witness under oath, and while it is true that no witness was called by the defendant to show the nature of Polk's work, it is equally true that no witness was called by the claimant to show that he was at work at all. We do not think the question of the burden of proof is here involved at all; for when the parties to the action agreed that claimant's decedent was working on a particular train it was surely unnecessary to call witnesses to prove it. To argue this question is to quibble over words; a fact agreed upon in no way differs from a proven fact; it is established beyond cavil.

In the face then, of the specific finding that Polk was at work, in the course of his employment, as a brakeman on an interstate train; the finding that the defendant called no witness to show what work he was doing is, we submit, immaterial.

It seems scarcely necessary to point out that there was no burden upon the defendant to do anything until the claimant proved facts to support a conclusion that her decedent was within the Compensation Act. If the claimant be deemed to have sustained the burden of proof by the finding that the decedent was employed as a brakeman on a particular train when he was injured, then, if there was any burden on the defendant to show the character of the employment, it must be deemed to have sustained it by the finding that Polk was employed as a brakeman on an interstate train.

In his award affirmed by the Supreme Court of Pennsylvania, the Referee said:—

"We feel that it might well be that while this train was standing on the tracks in the yard awaiting further orders to proceed or even for some other reason that the conductor of the crew or some other superior of Polk's might have delegated him to perform some duties for the defendant which were not incident to or necessary for the continuance of the interstate journey of the cars in this draft. The engine and crew were a yard engine and crew. The testimony shows that this crew had no duties to perform outside of the yard limits. We feel that, particularly with a crew of this sort, there may have been many things which this brakeman might have been delegated to perform while he was still a member of this crew and had in charge the cars shown by the defendant to have been in this draft, entirely separate and apart from the movement of these cars, and of course in that case he would not have been at the time of the occurrence of the injury actually engaged in performing the duties incident to interstate commerce."

(Referee's findings, Record page 13.)

This is no more than idle speculation. In the first place there is no finding that Polk was delegated by anybody to perform any duties incident to intrastate commerce, or, as the Referee put its, "entirely separate and apart from the movement of these cars." Yet the award is based flatly on the ground that the defendant failed to exclude by testimony some such possibility. It would seem, therefore, that the judgment has no foundation of fact on which to rest.

In **Louisville and Nashville R. R. vs. Finn,** 235 U. S. 601, the Court said:—

"It has repeatedly been held by this Court that an administrative order made indisputably contrary to the evidence or without any evidence, must be deemed arbitrary, and therefore subject to be set aside."

This Court has also repeatedly held that a Federal right is denied by the result of a finding without evidence to support it. **N. P. R. R. vs. North Dakota,** 236 U. S. 585; **K. C. So. Ry. vs. Albers,** 223 U. S. 573; **Mackay vs. Dillon,** 4 Howard 421; **Dower vs. Richards,** 151 U. S. 658; **Stanley vs. Schwalby,** 162 U. S. 255. Here after an express finding that Polk, when injured, was working as a brakeman on the train, the conclusion is reached that there is no proof that he was not doing some other work, and in consequence it is presumed that he was employed in some task incident to intrastate commerce. The denial of due process of law would seem to be involved by a judgment against the appellant without finding of fact to support it.

Respectfully submitted.

GEORGE GOWEN PARRY,
Counsel for Petitioner.

No. 296. October Term, 1920.

IN THE

SUPREME COURT OF THE UNITED STATES

PHILADELPHIA AND READING RAILWAY COMPANY,

Petitioner,

vs.

GEORGE E. FOLK,

Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESPONDENT.

[redacted]
Counsel for Respondent.
[redacted]
[redacted]

INDEX.

IN THE

Supreme Court of the United States.

October Term, 1920. No. 298.

PHILADELPHIA AND READING RAILWAY COMPANY,

Petitioner,

vs.

MARIE E. POLK,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

COUNTER STATEMENT OF THE CASE.

The questions involved are as follows:

In an action between two citizens of the State of Pennsylvania,

(1) Will this Court review findings of facts made by a competent tribunal and successively affirmed by three appellate tribunals of the State of Pennsylvania when the evidence is not a part of the Record and the

Pennsylvania Statute makes the decision as to fact final and not reviewable?

(2) Where decedent, at the time of the injury, was a member of a yard crew which worked exclusively within (but upon and over all the tracks in) a certain freight yard of defendant company, located within the City of Philadelphia, State of Pennsylvania, and where neither (a) the nature of the duties of decedent; (b) the location in the yard where he was injured; (c) upon what tracks he was injured; (d) what train it was that actually caused the injury; nor (e) what duties decedent was actually performing at the time of the accident, were shown by the evidence.

Can it be decided as a matter of law that the decedent was engaged in interstate traffic at the time of the injury, simply because the engine which worked with the crew, of which he was a member, was attached to a draft of cars (including at least one car in interstate commerce) which was at the time standing on one of the tracks in the freight yard?

(3) Is not the burden of proving a fact upon the party who asserts it?

The parties to the cause are Marie E. Polk, a citizen of the State of Pennsylvania, and the Philadelphia and Reading Railway Company, a corporation, incorporated under the laws of the State of Pennsylvania, and the occurrence which is the subject of the suit happened exclusively within the County of Philadelphia, and State of Pennsylvania.

The action was a compensation claim filed by a widow and children under the Pennsylvania Compensation Law, to wit, the Act of June 2, 1915, of Pennsylvania Pamphlet Laws, 1915, page 736, etc. The Act

provides in Section 302a that the employer and employee, or both, may by appropriate action decline to have the Act apply to their relationship, but in the absence of such declination, the Act is applicable, to employers and employes throughout the state.

On August 28th, 1917, between 10.00 and 11.00 o'clock P. M., John M. Polk, who was the husband of Marie E. Polk, was injured while working in the "Port Richmond" yard of the railroad company, in Philadelphia, Pennsylvania, and died from the injuries the next day.

The decedent was a **yard** brakeman, a member of a crew which, on the night of the occurrence was working in conjunction with a certain yard engine. At the time he was injured that engine was attached to a "draft" of cars, which "draft" contained one or more cars containing interstate commerce, but this "draft" of cars was then **standing** on one of the tracks in the railroad company yard. The reason for this "draft", or any of the cars being in the yard, was not shown, nor was it shown whether the engine was attached in order to shift the cars onto the different tracks in the yard, or to take out some of the cars, or add others. As a matter of fact just what was to be done with the cars or any of them was not shown, but it was clearly established that the yard crew had no duties to perform outside the yard.

What the decedent was doing at the time of the accident; by what train, or what cars he was injured; or on what tracks within the yard he was injured, was not shown.

The case was duly heard before a Referee of the Workmen's Compensation Board of Pennsylvania. At the hearing the defendant admitted on the record that at the time of the accident the decedent was a brake-

man in its employ, and stated that, while so employed, he was "caught between two cars," and sustained injuries, from which he died one day later (p. 11, Transcript of Record.)

The Referee of the Compensation Board, having heard, investigated and considered the matter, made certain findings of fact and conclusions of law, and made an award in favor of Mrs. Polk and against the Railroad Company.

From this award, the defendant company appealed successively to the Workmen's Compensation Board; Court of Common Pleas No. 5, of Philadelphia County, Pennsylvania, and to the Supreme Court of Pennsylvania; and all these tribunals affirmed the award of the Referee, and thereupon this appeal was taken to this Court.

BRIEF OF ARGUMENT.

A reading of the Appellant's Paper Book will show that the real thing which it is asking the Court to do, is to reverse and set aside the **findings of fact** made by the Compensation Referee, and this, without considering the evidence and proofs, upon which the findings of fact were based. This, notwithstanding the fact that the Pennsylvania law, applicable to the matter (Act of June 2, 1915, P. L. 736) provides, inter alia, as follows:

> "**Section 409.** A Referee's finding of fact, shall be final, unless the Board shall allow an appeal therefrom as hereinafter provided. The Board's finding of fact shall in all cases be final.
>
> From the Referee's decision on any question of law an appeal may be taken to the Board, and from any decision of the Board on a question of law an appeal may be taken to the Court as hereinafter provided."

"**Section 428.** Neither the Board nor any Referee shall be bound by the technical rules of evidence in conducting any hearing or investigation."

"**Section 417.** The Referee, if he shall deem it necessary, shall, either before or after any hearing, make an investigation of the facts set forth in the Petition or cause the same to be made." * * * * * * * * * "

"**Section 421.** " * * * * . The Board shall at all times have the power to make any investigation which it shall deem necessary to ascertain the facts."

This Act had been voluntarily accepted by the Railroad Company, which agreed to be bound by all its provisions.

This Court has frequently decided that legislation such as the Pennsylvania Compensation Law is constitutional.

New York Central R. Co. v. White, 243 U. S. 188;
Hawkins v. Bleakly, 243 U. S. 210;
Mountain Timber Co. v. State of Washington, 243 U. S. 219.

The Pennsylvania Supreme Court has steadily ruled that upon appeal the Referee's findings of fact are conclusive and that the evidence and proofs, upon which such findings are made, are not reviewable by the Courts.

McCauley v. Woolen Co., 261 Pa. 312.

The Pennsylvania Law provides (Sec. 413) that unless an answer be filed to a compensation claim within seven days, of receipt of notice from the Compensation Board, the allegations of the petition shall be deemed to be true.

An answer was filed in this case (p. 9, Transcript of Record), and in it the Railroad Company denied many of the averments of the claim petition and also **set up** an additional affirmative defense in the following language.

(P. 9, Transcript of Record):

> "3. The defendant denies that he is liable to pay compensation under the facts alleged in the claim petition, for the following reasons, because claimant's decedent and defendant were engaged in interstate commerce at the time the former was injured."

We feel that under the decisions of this Court,

Osborne v. Gray, 241 U. S. 16,

as well as under the Pennsylvania decisions,

Hench v. Ry., 246 Pa. 1,

and the general rules of evidence, the burden of proving this affirmative defense was upon the railroad company, which asserted it, and the question whether such fact was proven was a **question of fact** to be decided exclusively by the referee (Par. 409, Pennsylvania Act), such decision, however, being subject to a discretionary power of review in the Compensation Board (See Sec. 421, Penna).

The evidence is not a part of the record, and is not reviewable.

McCauley v. Woolen Co., 261 Pa. 312.

It is to be remembered also that the act provides that neither the Board, nor the Referee is bound by **technical** rules of evidence (Sec. 428).

In addition to proof by witness, and other evidence, the Act authorizes the Referee (Sec. 417) and

the Compensation Board (Sec. 421) to make any further investigation they deemed necessary.

Under the circumstances we contend that the decision of the Referee, **as to facts**, implies that he has fully considered the evidence, and has, himself, made such personal investigation, as to facts which he deemed important and his **findings of fact**, having been approved by the Compensation Board (p. 20, Transcript of Record), are binding and conclusive, and not reviewable, yet practically the whole of appellant's argument is a contention that the referee erred in his **findings of fact.**

The only finding of law, which can possibly be held to be covered by appellant's Assignment of Error, is in the following language:(p. 14, Transcript of Record).

> "And since the defendant has failed to meet the burden of proving that at the time of the occurrence of the accident, John M. Polk was actually engaged in performing duties incident to interstate commerce—the claimants are entitled to compensation."

This "Conclusion of Law" followed a finding of fact" on the same subject matter, to wit, (p. 13, Transcript of Record):

> "That the defendant had not met the burden of proving that at the time of the occurrence of the injury, John M. Polk was actually engaged in duties incident to interstate commerce."

In our judgment the first three specifications of error, filed by the appellant and practically all of its argument deal with these questions of fact. As a matter of fact, the third assignment (p. 5, Appellant's Paper Book) frankly admits that the affirmance of it would

necessitate this Court's passing upon evidence (which is not in the record) and the "**conclusions of fact**" and this, although the Pennsylvania Act provides in Section 409 (p. 751, Penna. P. L. 1915), that the Referee's findings of fact are final, and the Pennsylvania Supreme Court has ruled evidence not part of record and not reviewable.

McCauley v. Woolen Co., 261 Pa. 312.

The appellant has, however, argued the matter so fully in its paper book that we feel that it may not be amiss to make reply thereto on the merits.

The proceedings were begun by filing a claim petition on May 9, 1918 (pp. 5 and 6, Transcript of Record), wherein it was alleged, inter alia: (1) That the decedent died on August 29, 1917, as the result of an accident occurring in the course of his employment; (8) that at the time of the accident, the decedent was coupling cars in the railroad yard; (9) that he was crushed between cars while coupling them in the yard; (12) that the occupation of the decedent at the time of the injury was that of a brakeman, and that his employer was the Railroad Company.

In the answer, filed by the Railroad Company, which was sworn to by one of its representatives on June 6, 1918, (p. 9, Transcript of Record), it denied all these averments.

When the matter came on for hearing before the Referee on June 11, 1918, the Railroad Company, through its attorney, stated on the record that it agreed that on the day of the accident the decedent was working for the railroad company, and was injured while at his work, and that he died the day following as a consequence of the injuries so received (pp. 11 and 12, Transcript of Record). It also admitted that it had

not rejected the compensation act (see 1st Finding of Fact p. 11 Transcript of Record) and so prima facie was subject to its provisions.

After such statement had been made by its counsel and duly spread upon the record, the attorney for the railroad company called at least one witness to testify (p. 13 Transcript of Record). The evidence given by the witness is not shown in the record, but the findings of the referee, both of fact and of law, do appear (pp. 11, 12, 13 and 14, Transcript of Record), and an inspection of the "findings of fact" will show that the facts agreed to by the railroad company; the testimony given by the witness and, it may be, the Referee's own investigation were all considered by him, as was the fact that while the railroad company, in its answer to the claim petition (p. 9, Transcript of Record) had set up as an affirmative defense, to wit: that the parties were, at the time, engaged in interstate commerce, it had not produced evidence to prove it.

The record here, may or may not show the exact words used by the attorney for the railroad company in stating what facts he agreed to, but the petitioner here admits (p. 9, Petitioner's Brief) that they are incorporated in the referee's findings of fact.

On page 16 of its paper book, filed in the Supreme Court of the State of Pennsylvania—a copy of which is attached to the petition for certiorari, filed in this Court—petitioner states as a fact (with which it was familiar) that it was customary for compensation referees to endeavor to secure from parties an agreement on matters "as to which there is no real dispute, supplementing them by taking testimony upon matters either in dispute, or upon which one of the parties had no knowledge that would justify as admission."

On pp. 8 and 9, its brief here, petitioner argues

that claimant at the time of trial did not have sufficient facts in her possession, or witnesses to testify for her, to make out a prima facie case; but we do not agree with this statement. Under the Pennsylvania law, the claimant was not required to prove the details of the accident, and so it is evident that when prior to the hearing, counsel for petitioner was advised that counsel for the railroad company would admit facts sufficient to make out a prima facie case, it was not necessary for the claimant to produce witnesses to prove the same thing.

Among the facts admitted before the referee was the following:

> "5th. The defendant company had immediate knowledge of the occurrence of said injury."

Yet it did not produce witnesses or evidence to show just what did happen or to prove its affirmative defense. Finally, however, in a pleading, filed of record in the Pennsylvania Supreme Court, on February 10th, 1920, (p. 30, Transcript of Record), the Railroad Company admitted that it could have produced evidence had it desired to do so, for it says inter alia (p. 30, Transcript of Record) that it, the Railroad Company "was at the time of the hearing before the referee and still is able to prove the exact nature of the work that Polk was engaged in at the time of the accident."

The significance of this statement becomes evident when it is remembered that the Employer's Liability Act of the United States—to which the Railroad Company is now apparently desirous of sending this claimant for relief—fixes a limitation of two years for the commencement of suit, and the two years expired on August 28, 1919, or about six months prior to the date that the pleading was filed in which the statement

as to its having such evidence was made (pp. 30 and 31, Transcript of Record).

It is to be borne in mind that the railroad company in the answer which it filed at the inception of the proceedings, and which was supported by the oath of one of its officials (see p. 9, Transcript of Record) denied several of the paragraphs of the complaint, which seemed to say that the decedent was killed while in the performance of his customary duties, and it will be noticed that the language used by the company's attorney in stating the facts which constitute the fourth agreed finding of fact (p. 11, Transcript of Record) was cautious, to say the least. He very carefully refrained from saying that the decedent was injured by any particular train, or at any particular place in the freight yard, or in any particular manner, or what kind of operation of any trains was being performed at the time the decedent was injured. As a matter of fact, if the language used had said that decedent was engaged in interstate commerce, claimant would not have agreed to it.

The language used by the petitioner's attorney in making the admission is as follows: (p. 11, Transcript of Record)

> "4th. On that date, John M. Polk, while employed as a brakeman on a freight train in the Port Richmond yard of the defendant in Philadelphia, Pennsylvania, handled by Engine No. 832, was caught between two cars, and as a result thereof sustained certain injuries."

Petitioner said "employed as a brakeman", but did not say actually working as a brakeman, nor which, if any, of a brakeman's duties he was performing, nor that he was performing any of the customary duties of a brakeman at the time of the accident.

So also, the language used was "on a freight train in the Port Richmond yard of the defendant in Philadelphia, Pennsylvania, **handled** by engine No. 832."

There is not one word to say **when** the freight train had been **handled** by engine No. 832, and certainly none to say that it was being handled **at the time** that the occurrence happened, or that the "handling" of that particular train resulted in any injury to Mr. Polk.

Again, the language used "was caught between two cars, and as a result thereof, sustained certain injuries." It was not stated that the "two cars", between which it was said the decedent had been caught, were a part of a freight train then being handled by, or then attached to, engine No. 832, nor even that the "two cars" were a part of any train that had **at any time** been handled by engine No. 832.

While a witness was thereafter called, he did not attempt to show what was meant by "while 'employed' as a brakeman on a freight train." nor by "handled by engine No. 832", nor by "between two cars", but offered evidence merely to show that at the time the accident happened there "was a draft of freight cars attached to the engine, which was in charge of the crew of which John M. Polk was a member" (p. 12, Transcript of Record), but "this train was **standing** on the tracks in the yard" (p. 13, Transcript of Record).

The railroad company did not call any witness, nor attempt to prove what work John M. Polk was actually performing at the time he was injured (p. 13, Transcript of Record). It is admitted that the engine and crew were **a yard engine** and crew, and that they **had no duties to perform outside the yard limits** (p. 13, Transcript of Record).

With the sworn answer of the railroad company denying the averments of the claim petition before him, and with the carefully couched language stated by attorney for the railroad (p. 11, Transcript of Record) and the carefully restricted testimony offered by the railroad company fresh in his mind, the learned referee found, and decided, that it had not been proved that the decedent was engaged in interstate commerce at the time the occurrence happened, and we feel that in so deciding he arrived at the only conclusion possible under the record and evidence.

At any rate, it was a proper subject for a conclusion of fact, and all the facts necessary to a finding were decided against the railroad company by the referee, who was successively affirmed by the full Workmen's Compensation Board, by the Court of Common Pleas No. 5 of Philadelphia County, and finally by the Supreme Court of the State of Pennsylvania.

The testimony taken before the referee is not a part of the record and is not reviewable on appeal.

See:

McCauley vs. Imperial Wool Co., 261 Pa. 312.

It may well be that either by evidence or by personal investigation the referee was made acquainted with the physical situation that existed in the Port Richmond yard of the railroad company in Philadelphia, Pennsylvania, in which the accident happened.

It is a matter of common knowledge in Philadelphia that the railroad yard in question consists of many tracks, and a number of railroad buildings used for railroad purposes, and in the railroad yard there are always a large number of cars being shifted to and fro. Many cars when they reach this yard have reached their final destination, with the exception of the pos-

sible necessity of shifting them about within the yard, for purposes of convenience. Cars in the yard are constantly being made up into trains or drafts, to be sent to shop for repairs, or to be taken out of the yard, either loaded or empty. Most of these operations are not interstate.

It is conceded that the decedent was a member of a "yard crew", and that his crew had no duties to perform outside of the yard limits (p. 13, Transcript of Record). The ordinary duties of such an employee are numerous and diverse, the following being typical: tending switches and lights; sealing and opening of car doors; keeping of the yards in good order; inspection and tests of cars; signaling; connecting and disconnecting couplings, brakes, hoses, etc. His duties relate not to a "draft" of cars, at any particular instant attached to a particular locomotive, but also to all cars within the yard which the crew, of which he is a member, has "handled" at any time during that night, or which it has orders to "handle" at any time later the same night. His duties take him anywhere within the yard; to any track, and to any car or cars, located at any point within the yard. In addition, it is well known that the duties of such an employee requires him to go for and deliver train orders or other orders, which relate to any cars handled, or to be handled; to locate cars anywhere within the yard; to get way bills and cards, and to deliver same when and where directed, and to assist his conductor, the yard master and train master in any matter or in any manner, **which they direct him to do**, and even though he is a "member of a yard crew" his duties may be changed at any instant by any of these superiors.

Such duties must of necessity take him to practically every portion of the railroad yard, and within the

railroad yard it may well be that at all times there are other yard engines, and crews and other **intrastate** trains and crews, working at the same time, and so, it may well be that, at the moment of the accident, the decedent had been directed to perform duties in conjunction with any of these various things, and he may have been injured by any cars, upon any track, and by any crew within the yard. **Much of the traffic within the yard was admittedly not interstate** (p. 12, Transcript of Record).

In view of all these facts, we do not see how it can be said, **as a matter of law**, that the learned referee erred in arriving at his **conclusions of fact**.

Under the circumstances, we feel that it is idle for the railroad company to argue that the referee was not justified in his **conclusions of fact**, and in deciding that it, the railroad company, had not shown that the decedent was, at the time of the occurrence, engaged in interstate commerce. The question of interstate commerce was a matter of affirmative defense, raised by the railroad company in its answer to claimant's petition (p. 9, Transcript of Record), and having been thus raised by defendant, the burden was upon the defendant to prove it, and this it totally failed to do.

Osborne v. Gray, 241 U. S. 16 (p. 21):

> "It is apparent that there was no evidence requiring the conclusion that the deceased was engaged in interstate commerce at the time of his injury, and we are asked to supply the deficiency by taking judicial notice that the cars came from without the State. This contention we are unable to sustain. The make-up of trains and the movement of cars are not matters which we may assume to know without evidence. * * * The defendants knew the actual movement of the cars, and, failing to inform the Court upon this point, cannot complain that they have been deprived of a Federal right."

We feel that it is significant that while the company has raised the question as to the burden of proof by its specification of error, it has not cited any authority thereon, and has not really dealt with it in its argument.

The railroad company before the referee did not suggest that it had any other witnesses, nor that it knew of any other evidence which could be produced to more fully explain the occurrence. As a matter of fact, it was not until **February 10, 1920**, that it asserted that it "was at the time of the hearing before the referee and still is able to prove the exact nature of the work that Polk was engaged in at the time of the accident" (p. 30, Transcript of Record). When it is remembered that the Employers' Liability Act of the United States fixes a limitation of two years as the time for bringing suit, and when it is further remembered that this statement was first made by the railroad company **two years** and **six months** after the happening of the occurrence, it is obvious that the complainant would be irreparably hurt by an order of this Court opening the record and permitting the taking of any further testimony at this time.

DISCUSSION OF PETITIONER'S BRIEF.

In its brief the railroad company has distorted the facts and stated them to suit its own case. We have argued them at full length in this brief and will not further discuss them, except to point them out specifically.

Thus, in the statement of the question involved, it uses the words "freight train". The referee used the words "train" and "draft" indiscriminately. Surely there is no magic in the use of the word "train". There is no finding that it was routed as a "train" any-

where. The railroad company is merely asking this Court to find a particular fact. If there had been any question as to the meaning of the word "train" as distinguished from "draft", the remedy of the railroad company would have been a request for a hearing de novo, or new trial. This matter, of course, will not be considered by this Court.

Martineau v. Fairbanks, 112 U. S. 670.

At page 2 of its brief it uses the following language:

> "crushed between two cars in a freight train."
>
> "was at work in the course of his employment on this train."
>
> "The engine and crew were concerned merely with moving this train through defendant's yard."

There is no finding of fact showing how Polk was injured and what "two cars" crushed him.

There is no finding that the yard engine and crew would move this "train" or "draft" anywhere.

There is no finding that it was made up as a train; whether it was to be moved about the yard for convenience; or whether it was in the process of being made up or broken up.

In its second assignment of error it says that Polk "was **actually** employed as a brakeman on the train. * * *"

> "The third additional finding that the train was an interstate train."

These are new facts injected by the railroad company, at this time, and are directly contrary to the findings of fact in this case.

Page 9 of its argument, it states that it was established as an "undisputed fact that he was employed in the performance of his duties, in the course of his employment as a brakeman on this interstate train." This is directly contrary to the finding of the referee, and is merely an effort on the part of the railroad company to distort the facts, and now arrange them to suit its case.

CONCLUSION.

This case has been seriously considered by four tribunals of the State of Pennsylvania, and the law of the case has never been in dispute. It is the law laid down by this Court in the case of

Illinois Central Ry. v. Behrens, 233 U. S. 473.

In which case, this Court determined that the employer's Liability Act of the United States applied (p. 478):

> "Only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce. The true test always is: Is the work in question a part of the interstate commerce, in which the carrier is engaged."

If there had been any question as to the meaning of the words used by the referee, the railroad company had a complete remedy before the Compensation Board. It chose to rest its case on the question of law, to-wit, that it was not required to furnish evidence to prove its affirmative defense, and this question has been decided against it throughout all the Pennsylvania tribunals.

It is, therefore, submitted that the judgment of the Supreme Court of Pennsylvania should be affirmed.

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